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OF IMPURE HEARTS AND EMPTY HEADS: A HIERARCHY OF RULE 11 VIOLATIONS

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I. INTRODUCTION

Rule 11 of the Federal Rules of Civil Procedure prohibits certain types of litigation misconduct. The Rule's prohibitions are effected by a certification requirement:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[1]

If a lawyer or party violates Rule 11, the court may impose attorney fee sanctions against him.[2]

Since 1983, when Rule 11 assumed its present form, it has been severely criticized. Among the major criticisms of the Rule are that it deters meritorious filings along with frivolous

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1. FED. R. CIV. P. 11.

2.

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id.

filings; that it causes wasteful "satellite" litigation; and that it reduces civility in litigation.[3] Apparently moved by this criticism, the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference determined in 1990 to reconsider Rule 11.[4]

This article examines the prohibitions of Rule 11 to determine which prohibitions are least necessary and which are most harmful. For purposes of this article, it is most useful to consider the Rule as prohibiting three delicts, and as applying to two of those delicts both a subjective and an objective test. The three litigation delicts prohibited by Rule 11 are the assertion of a position not well grounded in fact, or a fact-violation; the assertion of a frivolous legal position, or a law-violation; and the filing of a paper for an improper purpose, or an improper purpose violation. As to fact-violations and law-violations, the Rule is violated either by the assertion of a position in bad faith or the assertion of a position without "reasonable inquiry."

In Part II of this article, I evaluate the relative necessity of Rule 11's prohibitions. I argue that the prohibition against

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3. *See, e.g.*, Elson and Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361 (1989); Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575 (1987); LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331 (1988); Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990); Nelken, *Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485 (1989); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988); Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23 (1985).

Although much of the commentary on Rule 11 has been negative, some have expressed more positive views. *See, e.g.*, Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479 (1990); Chrein, *The Actual Operation of Amended Rule 11*, 54 FORDHAM L. REV. 13 (1985); Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); Schwarzer, *Sanctions Under the New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181 (1985).

4. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., CALL FOR COMMENTS, 131 F.R.D. 335 (1990). In late April, 1991, the advisory committee on civil rules will meet to consider recommending amendments to Rule 11 to the Standing Committee on Rules of Practice and Procedure. "Revisions may be proposed for public comment, or the [advisory] committee may conclude to recommend no revisions [in 1991]. Or it is possible that the [advisory] committee may conclude that further discussions and hearings are in order." *Id.* at 345.

law-violations is less necessary than the prohibitions against fact-violations and improper purpose violations. I further contend that the reasonable inquiry requirement is less necessary than the bad-faith standard. In Part III, I demonstrate that most of the major problems with Rule 11 are a combined result of the reasonable inquiry requirement and the prohibition against law-violations. In conclusion, I propose that the reasonable inquiry requirement be eliminated, at least as to law-violations.

II. WHICH OF RULE 11'S PROHIBITIONS ARE LEAST NECESSARY?

A. *Relative Perniciousness of the Three Rule 11 Delicts*

The necessity of Rule 11's various prohibitions is determined by the perniciousness of the violations prohibited and by the propensity of lawyers and clients to commit or not to commit those violations. I will first evaluate the relative perniciousness of the three Rule 11 delicts: the fact-violation, the law-violation, and the improper purpose violation.

1. *Two Types of Fact-Violation*

In conducting such an evaluation, it is useful to distinguish between two polar types of fact-violations, or positions not "well grounded in fact." The first type is that in which the violation is hidden, at least initially, from the non-violator or is not demonstrable by the non-violator; I will refer to this type of violation as a hidden fact-violation. The second type is that in which the violation is both obvious to the non-violator and demonstrable by him. I will refer to this latter type of violation as an obvious fact-violation.

Illustrative examples of the hidden fact-violation and obvious fact-violation are, respectively, *Lockette v. American Broadcasting Companies, Inc.*[5] and *Sergio Estrada Rivera Auto Corp. v. Kim.*[6] *Lockette* was an employment discrimination case under Title VII of the Civil Rights Act of 1964.[7] Before filing suit, the plaintiff, Lockette, secretly tape recorded approximately

5. 118 F.R.D. 88 (N.D. Ill. 1987).
6. 717 F. Supp. 969 (D. Puerto Rico 1989).
7. 42 U.S.C. §§ 2000(e)-(e-17) (1987).

ten conversations between himself and his co-workers. The defendant, ABC, did not learn of the existence of these tapes until two weeks before trial.

Prior to learning of the tapes, ABC moved for summary judgment. In opposition to this motion, Lockette and his attorney submitted an affidavit in which Lockette asserted facts concerning at least one of the taped conversations. On the basis of these purported facts, which ABC was then powerless to disprove, the court denied ABC's motion for summary judgment.

When the tapes were disclosed, it became clear that Lockette lied in his affidavit. At a bench trial that began two weeks after disclosure of the tapes, the court granted ABC's motion for involuntary dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. The court subsequently granted ABC's motion for attorney fee sanctions under Rule 11, indicating that sanctions would be imposed against both Lockette and his attorney.[8]

In contrast to *Lockette, Sergio Estrada*[9] exemplifies an obvious fact-violation. Plaintiff Sergio Estrada, an auto dealership, sued defendants Sang and Helen Kim in the District of Puerto Rico. Sergio Estrada alleged that it had paid the Kims hundreds of thousands of dollars to secure franchise rights to sell Hyundai and Kia cars, but that the Kims had failed to secure the franchise rights and had refused to return the money.

The Kims filed a motion to dismiss for lack of personal jurisidiction. In the memorandum supporting their motion, the Kims claimed, relying on the affidavit of Sang Kim, that Sang Kim had engaged in "no business whatsoever in the Commonwealth of Puerto Rico . . . for his own personal benefit."[10]

In response, Sergio Estrada submitted an avalanche of documentary evidence detailing Sang Kim's myriad of contacts with Puerto Rico. All of these contacts were related to Sergio Estrada's cause of action. The documents submitted by Sergio Estrada included the Kims' Puerto Rican hotel bills, paid by Sergio Estrada; a copy of a business card featuring Kim as a

8. *Lockette*, 118 F.R.D. at 91-92. The court found that Lockette's attorney was aware of the tapes when he submitted Lockette's affidavit in opposition to ABC's motion for summary judgment. *Id.* at 91 n.3.

9. *Sergio Estrada*, 717 F. Supp. at 969.

10. *Id.* at 971 (quoting an affidavit sworn to by defendant, Sang Kim).

Vice-Chairman of Sergio Estrada and listing for Kim both a New Jersey and a Puerto Rican address; a copy of a company credit card in Kim's name; and copies of at least nineteen telexes that the Kims had sent to Sergio Estrada in Puerto Rico. These documents appear to have been in Sergio Estrada's possession; accordingly, it was not difficult for Sergio Estrada to prove that Sang Kim had sufficient contacts with Puerto Rico to establish personal jurisdiction.

The court in *Sergio Estrada,* of course, denied the Kims' motion to dismiss.[11] It also granted Sergio Estrada's motion for attorney fee sanctions under Rule 11, ordering that Sang Kim pay half the fees the plaintiff incurred in opposing the motion to dismiss, and that Kim's attorneys pay the other half.

A comparison of *Lockette* and *Sergio Estrada* reveals two primary differences between the hidden fact-violation and the obvious fact-violation. First, a hidden fact-violation may enable the violator to prevail. It was apparently a fortuity in *Lockette* that the defendant discovered the tapes of the conversations about which the plaintiff had lied. The hidden status of the tapes led to the denial of the defendant's motion for summary judgment and could theoretically have led to the defendant's defeat at trial. In *Sergio Estrada,* by contrast, the defendants' obvious fact-violation could not have enabled them to prevail: the plaintiff had in its possession all the documents necessary to prove minimum contacts. As the hidden fact-violation has the potential to sway the result of the case, it poses a far greater threat to the non-violator - and to justice - than the obvious fact-violation.

Not only does the hidden fact-violation pose a greater threat to the non-violator; it is also likely to impose a greater burden, in time and money, on the non-violator and on the justice system. Though a hidden fact-violation may be discovered relatively quickly, it may also be discovered late, as in *Lockette,* or not at all. By contrast, an obvious fact-violation is by hypothesis apparent to the non-violator immediately. The non-violator should therefore be able to demonstrate the violation rather easily and quickly.

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11. The court also found that Helen Kim had minimum contacts with the forum. This article does not discuss the minimum contacts issue as to Helen Kim, as the plaintiff's evidence was there less overwhelming and thus less illustrative of an obvious fact-violation.

All fact-violations are not of the two polar types illustrated above. Some fall somewhere on a spectrum between the hidden fact-violation and the obvious fact-violation, depending on how hard it is for the non-violator to discover and demonstrate the violation.[12] Nevertheless, it is useful to draw a sharp distinction between the hidden fact-violation and the obvious fact-violation because of the light such a distinction will shed on law-violations and on violations of Rule 11's reasonable inquiry requirement.

2. *Law-Violations*

It should be readily apparent that all frivolous legal positions, or law-violations, are closely analogous to one polar type of fact-violation described above: the obvious fact-violation. A lawyer may be able to hide the facts, but he will hardly ever be able to hide the law. If the concept of frivolousness has meaning, a legal position that is truly frivolous will easily be perceived as frivolous by the violator's opponent and by the judge.[13] Thus, for the same reasons set forth above in connection with the obvious fact- violation, the law-violation will not enable the violator to prevail on the merits of the papers filed. It will pose relatively little threat to the non-violator and will impose relatively little burden on the non-violator or on the justice system.

An example of a truly frivolous legal position is afforded

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12. Notwithstanding *Sergio Estrada*, 717 F. Supp. at 969, perjury is usually a hidden fact-violation, even if it concerns a matter about which the non-violator has knowledge, since it usually is not demonstrable as a violation.

13. Some would argue that the concept of frivolousness has no meaning, that a judge's decision as to whether a legal position is frivolous is purely subjective. As applied under Rule 11, the concept of frivolousness accepts that a legal position is generally not true or false in the same sense as an assertion of fact. Nevertheless, the concept of frivolousness posits a sort of continuum, in which some positions are more correct and some are less correct. At the far end of the continuum there fall positions that are so incorrect as to be frivolous and sanctionable. Integral to the concept of frivolousness is the belief that judges and lawyers can perceive that a position is so incorrect as to be frivolous and sanctionable, just as they can perceive that an assertion of fact is true or false.

If indeed there were no objective basis for a conclusion of frivolousness, readily ascertainable by lawyers and judges, then the sanctioning of frivolous legal positions would make no sense. For purposes of this article, I assume that there is such an objective basis, but argue that there is even so little point in prohibiting frivolous legal positions, especially those arising from negligence.

by *Weir v. Lehman Newspapers, Inc.*[14] In *Weir,* the plaintiff alleged that the defendant, a private entity, had violated his constitutional right to due process.[15] As the plaintiff did not allege that the defendant's actions constituted state action, the court had no difficulty in holding that the plaintiff had failed to state a federal constitutional claim. On the defendant's motion, the court imposed attorney fee sanctions against the plaintiff's attorney.

Obviously, the defendant in *Weir* was never in any danger of having judgment entered against it on the plaintiff's constitutional claim. It also could not have required much effort or expense for the defendant to convince the court that a private entity is not subject to liability for violations of constitutional due process. Thus, the plaintiff's frivolous claim, while a violation of Rule 11, was a relatively innocuous one.

Unfortunately, the relative innocuousness of Rule 11 law-violations has been obscured by the willingness of courts to impose sanctions against legal positions that are merely wrong or even against positions that are ultimately determined to be meritorious.[16] It is therefore no response to the characterization of law-violations I have offered to note that in some cases, lawyers, parties, and judges have expended substantial efforts in ostensibly demonstrating legal positions to be frivolous, or that judges have in some cases awarded substantial attorney fees as a sanction for law-violations. I would argue that such substantial efforts and substantial awards are more likely evidence that the challenged legal position was not truly frivolous than they are evidence that it was frivolous but not innocuous. If a legal argument is truly frivolous, it should not be hard to defeat.

a. *Law-Violations and the Controverted Duty of Candor*

Although it is far harder to hide the law than to hide the facts, lawyers have been sanctioned for attempting to hide the law, or more accurately for a lack of candor in their character-

14. 105 F.R.D. 574 (D. Colo. 1985).

15. *Id.* at 575. Specifically, the plaintiff alleged an "unwarranted invasion of his Constitutional right to freedom of association and right to personal choice in marital life." *Weir,* 105 F.R.D. at 575 (quoting plaintiff's complaint).

16. *See infra* notes 51-53 and accompanying text.

ization of the law. The most famous case of this kind is *Golden Eagle Distributing Corp. v. Burroughs Corp.*,[17] a case that has aroused considerable controversy.[18] A review of the issues in *Golden Eagle* suggests that certain violations of the controverted duty of candor - those involving the actual concealment of relevant authority - may be a greater evil than most law-violations. However, such a review also confirms the relative innocuousness of all law-violations as compared to fact-violations.

Golden Eagle involved a commercial dispute. The defendant, represented by the firm of Kirkland & Ellis, filed a motion for summary judgment. The district court denied the motion and imposed sanctions against Kirkland & Ellis.

The district court in *Golden Eagle* sanctioned Kirkland & Ellis because it violated a duty of candor that the district court inferred from Rule 11. The district court found that Kirkland & Ellis had violated this duty in two ways: by passing off an argument for the extension of existing law as an argument founded in existing law and by failing to cite adverse authority. The district court imposed sanctions even though it determined that the positions asserted by Kirkland & Ellis were not frivolous.

The Ninth Circuit reversed, holding that Rule 11 contains neither an argument identification requirement nor a requirement that counsel cite relevant authority. Only if the challenged position is frivolous, the appellate court held, can sanctions be imposed.[19]

The appellate court's construction of Rule 11 is convincing. Nevertheless, the issue for present purposes is not whether the appellate court correctly construed the Rule, but how pernicious are the two purported violations - argument misidentification and failure to cite adverse authority - found by the district court.

These two violations actually call for different analyses. Argument misidentification in itself is no threat to the non-violator. As long as the violator has not concealed relevant

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17. 809 F.2d 584 (9th Cir. 1987).

18. *See* Miller, *supra* note 3, at 491-98 (criticising appellate court's decision).

19. Five Ninth Circuit judges joined in dissent from the court's denial of a *sua sponte* request for hearing *en banc*. *Golden Eagle*, 809 F.2d 584 (9th Cir. 1987) (Noonan, J., dissenting).

authority, the non-violator can point out any mischaracterization of the law to the judge. The judge can then read the cases for himself and decide which position to adopt, as did the district court in *Golden Eagle.* Unless one believes that certain lawyers have so much credibility that their mere presence in a case can deprive the judge of his capacity for independent thought, it is hard to see why one should care if a lawyer mischaracterizes an argument for the extension of existing law as an argument founded in existing law.

Indeed, there is an air of unreality about demands that Rule 11 encompass an argument identification requirement, at least when such demands are made by judges: judges habitually announce new principles of law while purporting to stay within the confines of existing law. One does not even have to look beyond *Golden Eagle* for examples of this habit. The district court in *Golden Eagle* thought its conclusion that Rule 11 includes a duty of argument identification and a duty to disclose adverse authority to be a "settled principl[e]."[20] The appellate court, however, found the district court's holding to be not "supported by or consistent with presently controlling law . . . ."[21] Judge Noonan, dissenting from the Ninth Circuit's denial of rehearing *en banc* in *Golden Eagle,* in turn accused the panel in *Golden Eagle* of writing an opinion that "contradicts Rule 11."[22] These stark disagreements over the grounding of the *Golden Eagle* opinions in existing law form an ironic counterpoint to the issue of whether Rule 11 includes an argument identification requirement.[23] It is hard to understand why judges, who are supposed to be neutral, should be allowed greater latitude in expressing their views than lawyers, who are not supposed to be neutral. In any event, argument

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20. Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. at 127 (N.D. Cal 1984), *rev'd,* 801 F.2d 1531 (9th Cir. 1986), *reh'g denied,* 809 F.2d 584 (9th Cir. 1987).

21. *Golden Eagle,* 801 F.2d at 1541.

22. *Golden Eagle,* 809 F.2d at 586.

23. Another example of the well-worn judicial tendency to present new law as settled law is J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979), a decision that figured largely in the *Golden Eagle* case. In *J'Aire Corp.,* the California Supreme Court effectively overruled, at least in part, its prior decision in *Seely v. White Motor Co.,* 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). It did so without even citing *Seely.* The district court in *Golden Eagle* ruled that defendant's counsel Kirkland & Ellis merited sanctions for relying on *Seely* without citing *J'Aire Corp; Golden Eagle,* 103 F.R.D. at 128-29.

misidentification, by itself, is totally innocuous. Strictly speaking, it does not even represent an attempt to hide the law.

Intentional failure to cite relevant authority does represent an attempt to hide the law. However, in the vast majority of cases, such an attempt will be unsuccessful. Presumably, whatever authority the violator has failed to cite is equally accessible to the non-violator and to the judge. If the violator knowingly fails to cite an authority, the non-violator will usually cite it, as in fact happened in *Golden Eagle.*[24]

Indeed, the only cases in which a failure to cite contrary authority might be successful are close cases, not those in which the violator's position is frivolous. It is only in a close case that obscure authority, not likely to be found by the non-violator or the judge, might tilt the decision. If it is a Rule 11 violation to conceal authority adverse to a non-frivolous position, then such a violation may be a greater evil than law-violations generally. Obviously, however, it will still be a lesser evil than a fact-violation; in the case of a fact-violation, the violator's opponent and the judge enjoy far less access to the knowledge that would defeat the violator's position.

3. *Improper Purpose Violations*

Let us now turn to Rule 11's third effective prohibition, the prohibition against filings for an improper purpose. In practice, this third prohibition tends to overlap one or both of the first two prohibitions: If a paper is found to be filed for an improper purpose, it usually also is found to be frivolous in fact or law. Despite this overlap, however, improper purpose cases are distinctive. In such cases, the violator generally does not assert his position solely in order to prevail on the merits of the paper filed. Rather, the violator expects to receive some benefit from his violation other than prevailing on the merits.[25]

An example of the improper purpose violation, illustrating

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24. 801 F.2d 1531 (9th Cir. 1986).

25. The meaning of "improper purpose" is not entirely clear; that phrase may be extended to situations not embraced by the description set forth above. *See, e.g., Golden Eagle,* 809 F.2d at 586 (Noonan, J., dissenting) (it is an improper purpose to mislead the court). Nevertheless, the concept of attempting to obtain a benefit, other than to prevail on the merits, describes the core meaning of "improper purpose".

its distinctive characteristic, is *In re Perez*,[26] a bankruptcy case. In *Perez*, the debtors, Eliscio and Gregoria Perez, filed a petition under Chapter 13 of the Bankruptcy Code.[27] Since the debtors had no source of regular income and were unable to make payments under a Chapter 13 plan, the bankruptcy court lifted the automatic stay[28] and allowed a secured creditor, Suburban Coastal, to begin foreclosure proceedings against the debtors' residence.

At this point, the debtors' lawyer voluntarily dismissed their Chapter 13 case and filed another Chapter 13 petition on their behalf. The debtors' lawyer knew that his clients were not qualified to be Chapter 13 debtors; he filed the second petition solely in order to obtain another automatic stay and thereby forestall the foreclosure proceedings.

In response to the second Chapter 13 petition, Suburban Coastal again obtained an order lifting the automatic stay. Whereupon the debtors' attorney voluntarily dismissed the second petition and filed yet a third petition, once again seeking to forestall foreclosure proceedings.

On Suburban Coastal's motion, the bankruptcy court imposed attorney fee sanctions against the debtors' lawyer under Rule 11, Bankruptcy Rule 9011 and 28 U.S.C. § 1927. It should be noted that the debtors and their lawyer in *Perez* had no hope of prevailing on any of the three Chapter 13 petitions, in the sense of formulating a successful plan. They filed those petitions solely in order to obtain the benefit of the automatic stay. Normally, of course, the mere filing of a complaint or petition confers little benefit on the filer. However, by reason of the automatic stay, a bankruptcy petition does confer an immediate benefit on the petitioner, whether or not the petition is successful; it stays creditor action. Thus, the debtors in *Perez* could benefit from frivolous papers regardless of the merits of those papers.

Other examples of improper purpose violations are cases in which papers are filed in order to obtain an unjustifiable delay of proceedings[29] or in order to generate attorney fees

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26. 43 B.R. 530 (Bankr. S.D. Tex. 1984).

27. *Id.* at 531 (petition filed under 11 U.S.C. §§ 1301, 1307) (West 1982) ("Adjustment of Debts of an Individual With Regular Income").

28. The filing of a bankruptcy petition acts as an automatic stay against creditor action. 11 U.S.C. § 362 (West 1982).

29. FED. R. CIV. P. 11 ("not interposed for any improper purpose, such as to

for the lawyer filing the papers.[30] In all such cases, the common theme is that papers are filed not in order to prevail on the paper filed, but in order to obtain some other, unjustified benefit.

Since the improper purpose violator expects to receive a benefit from his violation, it is fair to assume that at least in some cases there will be a corresponding detriment to the violator's opponent. Improper purpose violations can accordingly be quite pernicious. Moreover, if the position asserted for an improper purpose is a legal position, the assertion of that position may be an exception to the rule that law-violations are innocuous.

A comparison of the characteristics of Rule 11's three delicts yields the conclusion that fact-violations and improper purpose violations are more pernicious than law-violations. In contrast to the other two delicts, the law-violation will generally impose little threat or burden on the violator's opponent or the justice system. Among law-violations, those that are asserted for an improper purpose are the most pernicious, followed by those violations - if indeed they are violations - that involve the failure to cite adverse authority.

B. *Incentives and Disincentives to Commit Bad-Faith Violations*

In evaluating the relative necessity of Rule 11's prohibitions, it is not enough to consider how great an evil each given violation is. One must also consider to what extent lawyers and their clients would be inclined, absent Rule 11, to commit or not to commit the violation. I will first evaluate the incentives and disincentives bearing on bad-faith violations. I will then examine the reasonable inquiry requirement and discuss lawyer inclinations associated with that requirement.

As to bad-faith violations, the incentives and disincentives of the litigation process mostly parallel the perniciousness of the violation. Let us assume that a lawyer or client[31] knows

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harass or to cause unnecessary delay . . . ").

30. United States v. Wright, 667 F. Supp. 1218 (N.D. Ill. 1987).

31. For purposes of this discussion, I assume that a bad-faith violation by a non-signing client falls within the purview of the Rule even if there is neither bad faith nor negligence on the part of the signing lawyer. *See* Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 569-70. (E.D.N.Y. 1986) [hereinafter, *Eastway II*]. *Compare Business Guides, Inc. v. Chromatic Enterprises, Inc.* ___ U.S. ___,

that a position he may assert is legally frivolous, not well-grounded in fact, or would be asserted for an improper purpose. Given such knowledge, the potential violator will have the greatest incentive to commit a violation that could enable him to prevail. The violation that is most likely to enable a violator to prevail is the hidden fact-violation. Accordingly, moral scruples aside, the potential violator will have a tremendous incentive to commit this type of violation.

Conversely, the potential violator will usually have a considerable incentive not to commit an obvious fact-violation or a law-violation. The potential violator will likely know that such violations, since they promise no benefit, will be a waste of time and/or money.

The disincentive to commit a law-violation may actually be even greater than the disincentive to commit an obvious fact-violation. A lawyer or client may at times not know that the fact-violation he is preparing to commit is an obvious fact-violation; he may not know that the poor factual grounding of his position can easily be proved by the non-violator. Such confusion is unlikely with respect to law-violations.

1. *Incentives to Assert a Frivolous Legal Position*

Nevertheless, situations exist where the normal economic disincentive to commit a knowing law-violation will not apply or will not have much force. The most important such exception is where the law-violation is also asserted for an improper purpose. As noted, improper purpose violations may benefit

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59 U.S.L.W. 4144 (1991) (where client actually signs papers, he or she is subject to the certification standard normally applied to lawyers).

Unfortunately, as noted by the court in *Eastway II*, the language of Rule 11 suggests that the Rule cannot be violated absent some fault on the part of the lawyer who signs the paper. Perhaps the Rule should be amended to provide that the signature of a lawyer is a certificate not only of his good faith, but also of his client's. One problem with such an amendment is that it could enable courts to sanction not only the client, but also the lawyer, even if the lawyer was not even negligent.

Barring amendment, it could be argued that bad faith on the client's part necessarily means that a paper is filed for an improper purpose, and that the lawyer's certificate as to the lack of an improper purpose is in the nature of strict liability. However, one should guard against making the improper purpose clause of Rule 11 a residual prohibition against all improper conduct not otherwise prohibited; such an expansive interpretation of the improper purpose clause would raise due process concerns.

the violator regardless of the merits of the paper filed. As the potential violator expects to receive a benefit from an improper purpose violation, he has an incentive to commit such a violation.

Another exception concerns *pro se* litigants. A *pro se* litigant is more likely than a lawyer to assert, knowingly, a frivolous legal position. First of all, the *pro se* litigant may realize that controlling law is adverse to him, but may refuse to accept that law for ideological reasons. Such an ideological motivation is displayed by tax protesters who continue to assert, with no hope of success, that the income tax system is unconstitutional.[32]

Other reasons why *pro se* litigants may knowingly assert hopeless legal positions are that they find the litigation process to be an empowering experience; they are able to litigate *in forma pauperis* without cost to themselves; and they have time to spend. All of these motivations may describe some *pro se* prisoner litigants.

Certain *pro se* litigants may not have the same incentives as ordinary lawyers and litigants to avoid the knowing assertion of frivolous legal arguments. Thus, deterrence may be more necessary with respect to law-violations committed by certain *pro se* litigants than with respect to law-violations generally.[33]

A final exception to the disincentive to commit law-violations concerns the failure to cite adverse authority. As noted above, such a failure may in rare cases enable the violator to prevail, though only where the violator's position is not frivolous. If a lawyer believes that adverse authority of which he is aware may for some reason not be discovered by his opponent or the judge, he will have an incentive to conceal such authority. To the extent that Rule 11 prohibits the concealment of authority adverse to a non-frivolous position, the Rule's deterrent force may once again be more necessary with respect to such concealment than with respect to law-violations generally.

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32. In rare instances, ideology may also make lawyers totally heedless of the law, but this phenomenon is largely restricted to *pro se* litigants.

33. However, deterrence will still be less necessary for law-violations committed by *pro se* litigants than it is for fact-violations: whatever incentives *pro se* litigants may have to assert frivolous legal positions, those positions, when asserted, will still be relatively innocuous.

C. *Negligent Violations*

As to fact-violations and law-violations, Rule 11 effectively prohibits both bad-faith and negligence. The prohibition against negligence is a result of the Rule's requirement of "reasonable inquiry." The reasonable inquiry requirement has been interpreted somewhat differently with regard to fact-violations than with regard to law-violations. With regard to fact-violations, courts have for the most part followed the language of the Rule and considered whether the lawyer or party conducted a reasonable pre-filing inquiry. With regard to law-violations, courts have generally considered whether the filer's position is frivolous, regardless of the inquiry actually conducted by the filer. In this article, the term "reasonable inquiry requirement" is used, somewhat loosely, to refer both to the requirement that a filer make reasonable inquiry and to the requirement, imposed by the courts as to law-violations, that the filer's papers attain a certain minimum level of meritousness.[34] Both these requirements have the effect of prohibiting negligent conduct that would not be prohibited by a bad-faith standard standing alone.

The reasonable inquiry requirement is less necessary than the prohibition against bad-faith conduct. This conclusion is based on an analysis similar to that set forth above with respect to law-violations: Litigation conduct that violates only the reasonable inquiry requirement is likely to be a lesser evil than conduct undertaken in bad faith. It is also likely to be subject to financial deterrence even absent Rule 11.

1. *The Incentive to Make Reasonable Inquiry*

It cannot be said that a potentially negligent violator has either an incentive or a disincentive to assert a legally frivolous position or a position not well grounded in fact. By hypothesis, the negligent violator does not know that the position he as-

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34. Many commentators have decried the tendency of the courts to focus on "product" rather than pre-filing "conduct" as an unnecessary and harmful departure from the language and intent of the Rule. *See, e.g.*, Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* at 96-97 (American Judicature Society 1989). I agree that focus on "product" is harmful but suspect that it may be an inevitable result of the objective standard introduced by the reasonable inquiry requirement.

serts is frivolous or ill-grounded. However, lawyers do have an incentive, absent Rule 11, to make a reasonable inquiry into the law and the facts. Failure to make reasonable inquiry leads lawyers to assert positions that lose, an outcome lawyers generally try to avoid.

A lawyer will make some inquiry into the law and facts, even absent Rule 11, to the extent he believes necessary to serve his own interest and that of his client. The reasonable inquiry requirement imposes on the lawyer an additional duty of care, not on behalf of the lawyer's client, but on behalf of the adverse party and the judge. The reasonable inquiry requirement adds yet another layer of financial deterrence to what the litigation process already provides.

This additional layer may have some benefits, though as noted below its benefits are usually overstated. But in any event, the additional deterrence Rule 11 provides against reasonable inquiry violations is less obviously justified than the deterrent force Rule 11 exerts against bad-faith violations: the latter type of violation is often encouraged, rather than deterred, by the natural incentives of litigation.

2. *Negligent Violations are Less Pernicious*

It happens, of course, that despite incentives to make reasonable inquiry, including those provided by Rule 11 itself, a lawyer will negligently assert a frivolous legal position or a position not well grounded in fact. However, such negligent violations are generally more innocuous than violations committed in bad-faith. By definition, the unknowing negligent violation is committed with no thought by the violator of how likely it is to further the violator's interest. Consequently, the negligent violation is less likely than a knowing violation to pose a threat to the non-violator or to impose much of a burden on him.

a. *Negligent Fact-Violations*

Negligent violations may be committed as to both law and facts. A negligent fact-violation is likely to be an obvious fact-violation - the most innocuous kind of fact-violation. If the violator could have discovered the groundlessness of his position by reasonable inquiry, the non-violator should be able to

do likewise. Thus, for example, in *Danik, Inc. v. Hartmarx Corporation*,[35] the plaintiff filed a class action antitrust suit without making reasonable inquiry into the defendant's operations. The plaintiff alleged that the defendant allowed only one retailer in each metropolitan area to sell its Hart, Schaffner & Marx line of menswear. In fact, however, as the defendant easily demonstrated, its Hart, Schaffner & Marx line was sold by more than one retailer in every metropolitan area except one.

The defendant in *Hartmarx* sought $61,917.99 in Rule 11 attorney fee sanctions.[36] The district court awarded $32,103.78, holding that the defendant's attorneys spent considerable time beyond that necessary to defeat the plaintiff's complaint. The sum of $32,103.78 may seem to reflect a significant burden. In the context of class action antitrust actions, however, it is a trivial burden. An antitrust plaintiff that committed a hidden fact-violation, enabling it to undertake typically massive discovery and proceed to a trial on the merits, could easily force a defendant to pay millions of dollars in attorney fees and to face the threat of liability in an amount even more crushing.

A negligent fact-violation will easily be met if it concerns the non-violator or if it concerns facts equally accessible to both parties. Moreover, even if a negligent fact-violation concerns the violator's own operations, it is likely to be more innocuous than a knowing violation. The hypothesized lack of any attempt to hide the facts simply makes it less likely that they will be hidden.

b. *Negligent Law-Violations*

Failure to make reasonable inquiry may also, of course, lead to a law-violation. The innocuousness of law-violations in general has already been noted. Negligent law-violations are more innocuous still. By definition, the negligent law-violation is not committed with any intent of enabling the violator to prevail or to accomplish some other, possibly improper purpose. It thus is even less likely than the bad-faith law-violation to pose a threat or impose a burden on the non-violator.

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35. 120 F.R.D. 439 (D. D.C. 1988), *aff'd*, 875 F.2d 890, *aff'd in part, rev'd in part*, Cooter v. Hartmarx Corp., 110 S. Ct. 2447 (1990).

36. *Hartmarx*, 110 S. Ct. at 2452.

As noted above, the law violations that most call for Rule 11's deterrent force are those committed for an improper purpose; those committed by *pro se* litigants unaffected by the financial disincentives of the litigation process; and, arguably, those involving a concealment of adverse authority. All of these violations are committed in bad faith; they cannot be committed through mere negligence.

c. *Actual Effect of the Reasonable Inquiry Requirement*

Enough of this airy speculation, advocates of the reasonable inquiry requirement might argue; that requirement has had a measurable effect on the behavior of lawyers.[37] However, the effect that has so far been measured is meaningless in determining the relative necessity of the reasonable inquiry requirement and is largely meaningless in determining its efficacy.

Empirical studies on the effect of Rule 11 have been performed by the Third Circuit Task Force[38] and the New York State Bar Association.[39] The Third Circuit Task Force found that of 426 lawyers responding to a questionnaire,[40] 43.5 percent felt that amended Rule 11 had increased their pre-filing factual inquiry to some extent and 34.6 percent felt that Rule 11 had increased their pre-filing legal inquiry.[41] Similarly, the New York State Bar Association found that of approximately 1,600 lawyers responding to a questionnaire,[42] 39.2 percent believed that their "pre-complaint" factual inquiry had become more extensive since the 1983 amendments to Rule 11, and 34.6 percent believed that their "pre-complaint" legal inquiry had become more extensive.[43]

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37. This position is suggested, though not necessarily advocated, in the Call for Comments, *supra* note 4, 131 F.R.D. at 345.

38. Burbank, *supra* note 34.

39. REPORT OF THE COMMITTEE ON FEDERAL COURTS: SANCTIONS AND ATTORNEYS' FEES (New York State Bar Ass'n 1987).

40. The questionnaire was sent to 1270 lawyers. Burbank, *supra* note 34, at 6.

41. Burbank, *supra* note 34, at 75-76, 151. The questionnaire actually asked whether amended Rule 11 had affected the lawyer's practice as to pre-filing legal and factual inquiry, but one can assume that no lawyer conducted a lesser pre-filing inquiry as a result of the amended Rule.

42. The questionnaire was sent to 8,000 lawyers; 20% responded. REPORT OF THE COMMITTEE ON FEDERAL COURTS, *supra* note 39, at 2.

43. *Id.* at A3.

However, the important issue is not whether Rule 11 has increased pre-filing inquiry, but whether it has lessened the filing of frivolous papers. The results set forth above do not even help to answer the latter question; they do not indicate to what extent the increased pre-filing inquiry prevented frivolous filings.

Two findings of the Third Circuit Task Force are somewhat more relevant. A total of 22.1 percent of the lawyers responding to the Task Force questionnaire thought that the amended Rule caused them to counsel clients not to file complaints, and 14.8 percent thought the amended Rule caused them to counsel clients not to file other papers.[44] As Professor Burbank cautions in the Task Force Report, some of the restraint induced by the amended Rule may represent over-deterrence of non-frivolous positions rather than deterrence of frivolous positions.[45] However, even if one were to assume that most of the papers not filed as a result of the Rule would have been frivolous, the finding of some restraint by lawyers still would not say much about the efficacy of the pre-filing inquiry requirement. One still does not know, from these results, how often the Rule-induced pre-filing inquiry leads to the abandonment of positions. Some lawyers, for example, may have undertaken an increased pre-filing inquiry in every case but may have decided not to file a complaint in only one case.[46]

How, then, could one test the efficacy of the pre-filing inquiry requirement in deterring the filing of frivolous papers? There obviously could be some difficulty in asking lawyers whether and how often they have been deterred from filing a frivolous paper; lawyers may be reluctant to admit to a propen-

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44. Burbank, *supra* note 34, at 75-76, 151.

45. *Id.* at 84.

46. In a recently published study, Professor Nelken propounded to a sample of lawyers from the Northern District of California many of the same questions used in the Third Circuit study. Of 68 lawyers responding to a questionaire, a total of 33 percent reported that amended Rule 11 had caused them to counsel clients not to file a complaint and 32 percent said that the amended Rule had caused them to counsel clients not to file other papers. Nelken, The *Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California,* 74 JUDICATURE 147, 152 (1990). These interesting results are subject to the same comments advanced above with respect to other empirical studies. One does not know how *often* Rule-induced pre-filing inquiry causes lawyer restraint, and some reported restraint may represent overdeterrence.

sity to file frivolous papers, even if that propensity has not been realized. However, one could ask the following two questions: First, in what percentage of all your cases have you conducted an expanded pre-filing inquiry as a result of Rule 11? Second, in what percentage of your cases have you refrained, as a result of Rule 11, from asserting a position?

I suspect that a study including these questions would reveal that the great majority of the increased work performed as a result of the pre-filing inquiry requirement does not result in the prevention of frivolous filings.[47] There is a certain irony in this hypothesized conclusion, as Rule 11 was ostensibly designed to streamline the litigation process.

If indeed the enhanced pre-filing inquiry resulting from Rule 11 rarely results in the abandonment of frivolous positions, it should come as no surprise. The reasonable inquiry requirement differs from the prohibition against bad-faith filings in that most of its deterrent force necessarily misses its target. In most cases, the additional work occasioned by the pre-filing inquiry requirement will not achieve the purposes of the Rule because the paper the lawyer intends to file will not be frivolous. Even if the paper is frivolous, a generalized unfocused pre-filing inquiry may not reveal the basis on which it is frivolous. After all, the lawyer attempting to satisfy the pre-filing inquiry requirement knows that he has to look for facts or law that would render his filing baseless, but he doesn't know what facts or law to look for.

By contrast, the lawyer who considers filing a paper in bad faith will experience the full deterrent effect of Rule 11. That deterrent force may still not be enough to deter the bad-faith filing, but at least it will not be largely dissipated in the manner of the pre-filing inquiry requirement.

In any event, even if it were determined that lawyers do refrain from asserting a position in a significant percentage of cases in which they conduct an enhanced pre-filing inquiry, the reasonable inquiry requirement would still be less necessary than the prohibition against bad-faith conduct. A reasonable inquiry violation would still likely be a lesser evil than a

47. One problem that would have to be overcome in such a study is that lawyers are more likely to remember conducting an expanded pre-filing inquiry if such an inquiry led them to abandon a position.

bad-faith violation, and would still be subject to financial deterrence even absent Rule 11.

III. WHICH OF RULE 11'S PROHIBITIONS ARE MOST HARMFUL?

Rule 11, as amended in 1983, has created a number of problems. In most of these problems one can find, as necessary ingredients, both the reasonable inquiry requirement and the prohibition against frivolous legal positions. If either of these ingredients were not present, the problem would largely disappear.

A. *Over-Deterrence*

One of the major criticisms of Rule 11 is that it has an over-deterrent effect, that it causes lawyers to forego not only frivolous positions, but also potentially meritorious positions.[48] The concept of over-deterrence presupposes that there is a range of legitimate positions a lawyer can assert, and that Rule 11 causes him to narrow that range unduly. Obviously, then, there would be no significant problem of over-deterrence were there no reasonable inquiry requirement. Under a bad-faith standard, lawyers would for the most part feel free to assert all positions in which they in good faith believed.

It should also be apparent that over-deterrence operates mainly against legal rather than factual positions. There is often room for legitimate argument over what the law should be, or what law should apply to a given set of facts. Consequently, a lawyer often has considerable leeway in formulating his client's legal position. In asserting his client's factual position, by contrast, a lawyer is limited to the facts as he and his client know them. He may argue what the facts are, but he can hardly argue what the facts should be. As the lawyer generally has no range of legitimate factual positions to assert, Rule 11 cannot force him to narrow that range unduly.

To be sure, the advisory committee notes to the 1983 amendments caution that the Rule "is not intended to chill an attorney's enthusiasm or creativity in pursuing *factual or legal* theories."[49] But it is difficult to imagine that there are many

48. *See* authorities cited *supra* note 3; this topic is of concern to all of them.
49. FED. R. CIV. P. 11 advisory committee note (emphasis added).

"creative" factual theories lawyers should be encouraged to assert. Indeed, the conjunction of the terms creative and factual theory seems almost a euphemism for perjury.

1. *Retarding the Development of the Law*

An important ancillary effect of over-deterrence is calcification of the law. Commentators have argued that Rule 11 serves to preserve the status quo by discouraging challenges to precedent.[50] Once again, both the reasonable inquiry requirement and the prohibition against frivolous legal positions are necessary ingredients in this problem. Challenges to precedent are of course legal positions; such challenges would not be discouraged if judges evaluated them under a bad-faith standard.

Moreover, concerns about Rule 11's effect on the development of the law suggest that over-deterrence of factual positions, if it sometimes occurs, may have less broad effects than over-deterrence of legal positions. A senseless precedent that is artificially preserved may cause injustice to many litigants or potential litigants; over-deterrence of a factual position is likely to affect only the party to the case at hand.

B. *Wrongful Imposition of Sanctions*

The reasonble inquiry requirement and the prohibition against frivolous legal positions also combine to cause injustice to litigants in the form of sanctions wrongfully imposed. It is by now painfully obvious that judges sanction legal positions that are not truly frivolous, assuming, once again, that the term "frivolous" has any meaning. Judges have sanctioned positions that were adopted on appeal;[51] positions that had been taken, or were being taken contemporaneously, by another federal judge in the very same litigation;[52] and positions that

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50. *See, e.g.*, LaFrance, *supra* note 3.

51. Trident Center v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 570 (9th Cir. 1988); Kucel v. Walter E. Heller & Co., 813 F.2d 67, 74 (5th Cir. 1987). These cases were noted in Joseph, *Redrafting Rule 11*, NAT'L L.J. at 12-13 n.5 (October 1, 1990).

52. In Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d 177 (7th Cir. 1985) [Colts III], the court sanctioned a position that had been suggested in Indianapolis Colts v. Mayor and City Council of Baltimore, 733 F.2d 484, 488 (7th Cir. 1984) [hereinafter Colts I]. In Analytica, Inc. v. NPD Research,

were later to be adopted by the Supreme Court.[53]

It has been suggested that judges are:

> more comfortable correcting a party's legal contentions than they are in second-guessing what may be a materially incorrect statement of fact. It is easier for courts to detect errors in law, by referring to lawbooks, than to detect misrepresentations of facts, which remain outside the courtroom.[54]

This theory appears sensible. Imagine what a judge's attitude would be if he could go back in time and observe the facts of a case. He would likely develop a certain intolerance to perceptions different than his own, even in situations where his own perception happened to be faulty and the facts happened to be otherwise than as he saw them. Indeed, some believe that egregious judicial errors as to legal frivolousness, such as those adverted to above, are no accident; judges are actually prone to sanction non-frivolous legal positions.[55] In any event, judges appear to have done a far worse job in applying the prohibition against frivolous legal arguments than in applying the prohibition against positions not well grounded in fact.

This disparity in the willingness of judges to award sanctions - and hence in the tendency to award sanctions in error - would not be so great were it not for the reasonable inquiry requirement. Just as a judge cannot usually see the non-documentary facts of a case, so he cannot see into a lawyer's mind. Under a subjective standard, judges would not be so eager to sanction legal positions with which they disagree.

Inc., 708 F.2d 1263 (7th Cir. 1983), the panel majority sanctioned a position approved by the dissenting judge. These cases are discussed in Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments,* 132 F.R.D. 309, 323-26 (1990).

53. Peters v. Wilson Plastics, 38 F.E.P. 937 (N.D. Ill. 1985) (sanctions under Title VII). This case is discussed in Stein, *supra* note 52, at 318.

54. Medina, Henifin & Cone, *A Supplemental Analysis of Reported Decisions Applying the 1983 Amendments to Rule 11, 16 and 26 of the Federal Rules of Civil Procedure* 12, 13 (1985) at 12-13, *quoted in* Kassin, *An Empirical Study of Rule 11 Sanctions* 33 (Federal Judicial Center 1985).

55. Grosberg, *supra* note 3, at 606, 635 (1987); Stein, *supra* note 52, at 316-17.

C. *Use of Rule 11 as a Litigation Tactic*

Closely related to the tendency of judges to go overboard in sanctioning legal positions is the tendency of lawyers to threaten and seek sanctions unjustifiably. As I have elsewhere argued, lawyers face powerful incentives to invoke Rule 11 against legal arguments that are not frivolous, but dangerous.[56] Consequently, they often invoke Rule 11 as a tactic, in order to affect the outcome of a case on the merits.

Rule 11 is considerably less amenable to use as a litigation tactic against factual positions than against legal positions. In large part, this is because it is a less credible tactic. If a lawyer who is threatened with sanctions has some testimony or evidence to support a factual position, he can be fairly confident that he or his client will not be sanctioned. Therefore, he is unlikely to be swayed by the threat of sanctions. By contrast, if a lawyer has authority or arguments to support a legal proposition, it is always possible that his authority will be distinguished and his arguments dismissed as frivolous.

Another reason why Rule 11 is less amenable to tactical use against factual positions is that the lawyer considering such use will often have insufficient information. He will not know exactly what evidence could be adduced in support of his opponent's factual position, should he attack that position via Rule 11. A lawyer who invokes Rule 11 against a factual position runs a greater risk of appearing foolish or even of being sanctioned himself.

The credibility of a tactical invocation of Rule 11 depends also, of course, on the reasonable inquiry requirement. Under a bad-faith standard, a lawyer who truly believed in his position would have little to fear when faced with the threat of sanctions. Consequently, his opponent would have little reason to manufacture such a threat.

D. *Satellite Litigation*

Another major criticism of Rule 11 - possibly the most important criticism - is that the Rule causes expensive and time-consuming "satellite litigation" over sanctions. This prob-

56. Stein, *supra* note 52, at 311-16.

lem is related both to the undue willingness of judges to sanction legal positions and to the undue willingness of lawyers to invoke Rule 11 as a litigation tactic.

Empirical studies have shown the problem of satellite litigation to be more troubling than previously thought; they have demonstrated that when both published and unpublished opinions are considered, a relatively small percentage of Rule 11 motions are granted.[57] If the results were otherwise and a large percentage of Rule 11 motions were justifiably granted, it might be easier to consider the resulting satellite litigation a necessary evil. But the low success rate of Rule 11 motions suggests that the time and resources consumed by these motions is not time well spent.[58]

It cannot be said that satellite litigation, like over- deterrence, is a problem caused solely by the combination of the reasonable inquiry requirement and the prohibition against law-violations. Nevertheless, these two elements make the problem much worse than it otherwise would be. As noted above, negligent law-violations are the most innocuous of all Rule 11 violations. Accordingly, the satellite litigation they engender is less justified than other satellite litigation associated with Rule 11.

Moreover, I believe that motions alleging law-violations, with no credible allegation of bad faith, constitute a majority of all Rule 11 motions brought, but are granted at a much lower rate than motions alleging fact-violations. Unfortunately, this conclusion, which is largely based on my own litigation experience and those of other litigators I know, cannot easily be tested against currently available empirical studies.

Two valuable empirical studies, adverted to earlier, are the Third Circuit Task Force Report[59] and a report of the New York State Bar Association.[60] Neither study yields a break-

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57. Burbank, *supra* note 34, at 57 (13.6 percent granted); *Report of the Committee on Federal Courts*, *supra* note 39, at A2 (27.2 percent granted); Nelken, *supra* note 46, at 149 (maximum estimate of 25 percent granted, minimum estimate of 6.67 percent granted).

58. It might be argued that even Rule 11 motions that are denied serve some deterrent purpose. It is more likely that they serve an over-deterrent purpose, since they subject positions that should not be sanctioned to the threat of sanctions.

59. Burbank, *supra* note 34.

60. COMMITTEE ON FEDERAL COURTS, *supra* note 39.

down of sanction motions according to the basis for sanctions sought, although the Third Circuit Task Force did try to gather such data.[61]

Empirical work should be conducted on the topical distribution of Rule 11 motions. If such work supports the hypothesis that the majority of Rule 11 motions allege a law-violation, it would appear that such motions are responsible for most of the satellite litigation engendered by Rule 11. A finding that motions alleging a law-violation are granted at a lower rate than motions alleging a fact-violation would suggest that the satellite litigation engendered by allegations of law-violations is doubly unjustified - both because such violations tend to be innocuous and because motions alleging such violations tend not to be meritorious.[62]

IV. CONCLUSION

The drafters of the 1983 amendments to Rule 11 made a number of changes to the old Rule.[63] Of these changes, two

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61. The questionnaires distributed to the court clerks specifically asked for the grounds on which sanctions were sought. Burbank, *supra* note 34, at 120. However, it appears that the vagueness of the motions filed and the clerks' unfamiliarity with the intricacies of the cases made it impossible to obtain a useful breakdown.

62. How could one reconcile the hypothesized low success rate of law-based motions with the greater willingness of judges, everything else being equal, to grant such motions? The likely explanation would be that even though judges are more willing to grant law-based motions - sometimes to the point of unseemly eagerness - the great majority of law-based motions are so lacking in merit that they are not granted.

63. Before the 1983 amendments, Rule 11 read, in part, as follows:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit . . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

stand out as most significant: the imposition of a reasonable inquiry requirement and the specification of attorney fees as an available sanction. The reasonable inquiry requirement has led to the evaluation of papers under an objective standard; the mention of attorney fees has made them the sanction of choice. A third change, not as momentous as the first two but still important, was to make the imposition of some sanction for a Rule violation mandatory, at least in theory.

One of the leading commentators on Rule 11, Professor Melissa Nelken, has proposed that all reference to attorney fees be deleted from the Rule, and that courts be directed, through an advisory committee note, to impose an attorney fee sanction only "in an extraordinary case."[64] Several advantages would accrue from such a repeal of the second major change wrought in 1983. The absence of routine fee-shifting would make it less attractive for lawyers to file Rule 11 motions, thus reducing satellite litigation. Overdeterrence would also be reduced, as lawyers would have less reason to fear that a crushing attorney fee sanction would result from the assertion of creative or challenging arguments.[65]

Professor Nelken's proposal would be an improvement over the current Rule. Nevertheless, it has drawbacks. If overdeterrence would be reduced by the elimination of routine fee-shifting, so, inevitably, would proper deterrence. Moreover, deterrence would be reduced for all Rule 11 violations more or less equally - both those violations that merit the most concern and those that merit the least.

The hierarchy of Rule 11 violations set forth above suggests that instead of reducing deterrence for all violations, it may be worthwhile to eliminate the prohibition against those that are generally innocuous. Such a pruning of Rule 11 could be accomplished by repealing the other major innovation introduced in 1983, the imposition of a reasonable inquiry requirement. A more conservative alternative would be to eliminate the reasonable inquiry requirement only for law-violations.

As demonstrated above, the worst violations of Rule 11

64. Nelken, *supra* note 3, 41 HASTINGS L.J. at 407.

65. Nelken, *supra* note 3, 41 HASTINGS L.J. at 407 (proposed Advisory Committee note).

are those that are committed in bad faith. The violations that are least pernicious, and that least require the Rule's deterrent force, are those that are committed through ignorance or inadvertance. Least troubling of all are legally frivolous positions that are not asserted in bad faith.

Moreover, most of the major problems caused by the Rule can be traced to the reasonable inquiry requirement, and specifically to the application of that requirement to law- violations. If there were no reasonable inquiry requirement, there would be little or no overdeterrence; no explosion of satellite litigation; little injustice from the wrongful imposition of sanctions; and little use of Rule 11 as a litigation tactic. Such an amelioration of the Rule's ill effects would occur even if the reasonable inquiry requirement were eliminated only as to law-violations.

It might be argued that the Rule prohibited only bad-faith conduct until 1983, and that the drafters of the 1983 amendments found this prohibition insufficient. However, a great part of the purpose of the 1983 amendments to Rule 11 was to deter specifically bad-faith conduct. This purpose is evident in the repeated references to "abuse" in the advisory committee notes:

> Experience shows that in practice Rule 11 has not been effective in deterring abuses.
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> . . .
>
> Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.[66]

It is now clear that as a result of the 1983 amendments to Rule 11, other than the reasonable inquiry requirement, judges are more willing to make an explicit finding of bad-faith conduct and to sanction such conduct. There are several likely reasons for the increased enforcement of Rule 11 in cases where an explicit finding of bad faith is made. First, the 1983

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66. FED. R. CIV. P. 11 advisory committee note. Some would characterize failure to make a reasonable inquiry as an "abuse." *See, e.g.*, Schwarzer, *supra* note 3, 101 HARV. L. REV. at 1020-21. Whatever the merits of this view under the current language of the Rule, it would seem inaccurate with respect to actions taken or not taken before the Rule contained a reasonable inquiry requirement.

amendments to Rule 11 have heightened awareness of various sanctions provisions among lawyers and judges. Second, the explicit provision for attorney fee awards in Rule 11 has given lawyers more of an incentive to invoke that Rule against bad-faith conduct. Third, the now-mandatory nature of sanctions under Rule 11 has increased judicial willingness to impose sanctions. All of these factors would remain in play even if a finding of subjective bad-faith were once again necessary in order to impose attorney fee sanctions under Rule 11.

There is after all no inherent barrier against determinations that litigation conduct has been performed in bad faith. Judges and juries make similar determinations all the time in criminal cases, by inferring intent from conduct. It should be easier to draw such an inference with regard to Rule 11 violations, as there is no requirement of proof beyond a reasonable doubt.[67]

In any event, the 1983 amendments were an experiment. The two major elements of this experiment were the broadening of the Rule's scope, through imposition of an objective standard, and the strenthening of the Rule's deterrent force, through reference to the attorney fee sanction. As the results of the 1983 experiment have provoked considerable dissatisfaction, it would seem reasonable to try a more limited experiment, jettisoning one or the other of the two major innovations introduced in 1983.

67. Obviously, some bad-faith violations would escape sanction if the reasonable inquiry requirement were eliminated, but that seems a small price to pay.